Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

No. 09-264

IN THE
Supreme Court of the United States

CENTAURI SHIPPING LTD.,
Petitioner,

v.

WESTERN BULK CARRIERS KS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a foreign corporation's registration for authority to conduct business in the State of New York, pursuant to and in conformity with the statutory requirements for doing so, coupled with the appointment of an agent for service of process sufficient to render a foreign corporation "found within the district" for purposes of Rule B(1) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure?

CORPORATE DISCLOSURE STATEMENT

Respondent, Western Bulk Carriers KS, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

Centauri Shipping Ltd. ("Centauri") commenced this action on June 5, 2007 claiming damages against Western Bulk Carriers KS ("WBC") based on an alleged wrongful arrest[1] of Centauri's vessel in Angola and seeking enforcement under international comity principles of a Judgment issued by the court in Angola. Plaintiff also sought and obtained an Ex Parte Order for issuance of process of maritime attachment and garnishment ("PMAG") pursuant to Rule B of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions ("Rule B"). *Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 528 F.Supp.2d 186, 187 (S.D.N.Y. 2007). Centauri's counsel filed an affidavit in support of its motion for an ex parte order of maritime attachment and garnishment pursuant to Rule B claiming that WBC could not be found within the Southern District of New York (the "District") and that it could find no records with the New York Secretary of State, Department of Corporations relating to WBC. *Id.* The affidavit filed by Centauri's counsel's was false because it failed to disclose to the district court that WBC was registered to conduct business within the State of New York since 2005 and

[1] WBC disputes Centauri's assertion that WBC "wrongfully arrested" the M/V CENTAURI at Luanda, Angola in March 2005. Pet. 8. WBC also disputes Centauri's assertion that the Supreme Court of the Republic of Angola ruled that WBC had wrongfully arrested the vessel and/or that it ruled that WBC had "acted in bad faith by intentionally filing misleading documents with the lower court when seeking the arrest of Centauri's vessel." *Id.* The Supreme Court of the Republic of Angola made no such findings.

that it had a designated agent for service of process within the District. *Id.* Centauri's counsel admitted this critical misrepresentation of fact upon which the issuance of the June 5, 2007 Ex Parte Order was premised. *Id.* at 188. The district court, not possessing accurate facts regarding WBC's presence in the District, issued the Ex Parte Order on June 5, 2007 in the sum of $15,350,796. *Id.* at 187.

Thereafter, Plaintiff proceeded to serve the PMAG on various garnishee banks within the District. Over the period of the next several days, various electronic funds transfers ("EFTs") being routed through the garnishee banks, both those being paid by and to WBC, were attached. WBC then posted a surety bond as substitute security for the attachment of funds in the hands of the garnishee banks, which the district court approved by order dated June 15, 2007. *Id.*

WBC then moved to vacate the attachment pursuant to Rule E of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions (hereinafter the "Supplemental Rules"). *Id.* at 187-188. On September 5, 2007, the district court heard oral argument on the Motion to Vacate the Maritime Attachment. *Id.* at 188. On September 7, 2007, the district court issued an oral decision vacating the attachment based upon the fact that WBC was "present" in the District for Rule B purposes at the time Centauri filed its Verified Complaint. *Id.* The district court issued a written Order dated September 12, 2007 vacating the attachment. *Id.*

On September 17, 2007 Centauri filed a notice of appeal of the September 12, 2007 Order. *Id.* In addition, on September 17, 2007, Centauri filed a motion in the district court to stay the *vacatur* decision pending appeal. *Id.* In a Memorandum and Order dated October 12, 2007, the district court denied Centauri's motion for a stay pending appeal, but granted a temporary stay to allow Centauri to seek the same relief from the Second Circuit. *Id.* Centauri then moved for a stay in the Second Circuit which was granted on January 30, 2008.

On April 20, 2009, the Second Circuit issued a Summary Order affirming the district court's September 12, 2007 vacatur Order, following its earlier decision in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), holding that "registration with the New York Department of State, pursuant to New York Business Corporation Law § 1304, to conduct business in New York and designation of an agent within the district upon whom process may be served constitutes being 'found' within the district for purposes of Rule B. . . ." Pet. App. 2a; *Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 323 Fed.Appx. 36 (2d Cir. 2009). The Second Circuit denied Centauri's motion for rehearing *en banc* by Order dated July 10, 2009.

Centauri's petition to this Court followed on August 28, 2009.

REASONS FOR DENYING THE PETITION

The limited question which this case presents is whether a foreign corporation's registration for authority to conduct business in the State of New York, pursuant to and in conformity with the statutory requirements for doing so, coupled with the appointment of an agent for service of process renders it "found within the district" for purposes of Rule B(1) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions. Centauri urges that the question presented is "one of exceptional importance" to the global maritime community. Pet. 6.

Centauri's assertion vastly overstates the importance of the issue, but more importantly, even if this Court were to grant certiorari and reverse the decision below, under the Second Circuit's recent decision in *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009) the Rule B Ex Parte Order issued in the district court would nevertheless be subject to vacatur. In *Jaldhi*, employing a "mini en banc procedure,"[2] the Second Circuit overruled its recent prior decisions in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied* 539 U.S. 927 (2003); and *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543

[2] Acknowledging that a panel of the court is "'bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court,' *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)" the *Jaldhi* court nevertheless overruled these cases without conducting an en banc hearing. *Jaldhi*, 2009 U.S. App. LEXIS 22747 at *23.

F.3d 104, 109 (2d Cir. 2008), and held that "[b]ecause EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B." *Jaldhi*, 2009 U.S. App. LEXIS 22747 at *35. No point would be served for this Court to grant review on Centauri's "found within the district" issue (irrespective of its cert-worthiness), only to have the attachment vacated on *Jaldhi*'s threshold ground of applicability to EFTs. In short, Centauri's petition is a sub-optimal vehicle for the issue it ostensibly presents.

The Second Circuit's decision below is, moreover, limited to Rule B cases filed in New York. Whether a foreign corporation that registers to conduct business in the State of New York can be "found" in New York for Rule B purposes is an issue that by its very nature can neither conflict with nor affect the law in any other circuit. Moreover, the Second Circuit's determination that a defendant is "found" within the district for Rule B purposes when it is registered to conduct business in the State of New York prior to the filing of the verified complaint does not fly "in the face of prior decisions of this Court recognizing the importance of maritime attachment and its vital historical purposes" as Centauri strains to contend.[3] Pet. 20. The Second Circuit's decision does no such thing because it does not in any way place any general limitations on the utility of Rule B. Rather, the decision below simply clarifies that a

[3] Later in its Petition, Centauri candidly admits that the Second Circuit's decision does not actually conflict with any of this Court's prior holdings. Pet. 26-27.

certain class of defendants otherwise subject to the general jurisdiction of New York courts can be "found" within the district for Rule B purposes.

I.

THE DECISION DOES NOT INVOLVE ANY IMPORTANT FEDERAL-STATE "INTERPLAY" CONCERNS

Centauri criticizes the Second Circuit for looking to New York state law to determine the effect of WBC's registration to conduct business in the State of New York on the question of whether it can be "found" for Rule B purposes. Neither Rule B nor any other federal rule or statute provide a direct answer to that question. But that is not a prudential ground to grant review here. The relevant precedents hold that in the absence of an established federal rule, federal courts should look to state law in order to fashion a federal rule. *West v. Conrail*, 481 U.S. 35, 39-40 & n.6 (1987) (with the caveat that "we borrow [from state law] no more than necessary" "to fill the gap left by Congress"). Such is entirely consistent in the maritime context. *See, e.g., Madruga v. Superior Court of State of Cal.*, 346 U.S. 556, 561 (1954) ("a state, 'having concurrent jurisdiction, is free to adopt such [in personam] remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law'." (quoting *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924)). This is precisely what the Second Circuit did in this case. Therefore, Centauri is incorrect in its contention that the Second Circuit improperly analyzed the underlying question presented here.

II.

THE DECISION DOES NOT AFFECT UNIFORMITY OF MARITIME LAW

Centauri contends that Second Circuit's decision disrupts uniformity of maritime law. Without identifying the issue specifically, Petitioner turns federal preemption analysis on its head by urging a misapplication of maritime law's uniformity principle, which derives from admiralty preemption cases.

The uniformity issue typically arises, as it did in *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994), when application of various state laws would lead to divergent substantive results in cases decided under federal admiralty jurisdiction. But in *American Dredging*, this Court held that a state statute affecting the application of a *forum non conveniens* defense did not so appreciably affect substantive (as distinct from procedural) maritime remedies as to be pre-empted. *See id.* at 453.

What Centauri appears to be urging is the uniform rejection of the foreign corporation registration statutes of all fifty states. Yet, in order for state law to be preempted under this Court's decision in *Southern Pac. Co. v. Jensen*, 244 U.S. 204, 216 (1917), it must be first determined to work a material prejudice to a characteristic feature of the maritime law. Centauri fails to explain how application of the New York registration statute to the fact-based determination of whether a defendant can be "found" in the district for Rule B purposes works a substantive and material prejudice to the vitality of Rule B attachments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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